No. 15,086

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

LEWIS H. SAPER, as Trustee in Bankruptcy of Riverside Iron & Steel Corporation,

Appellant,

vs.

THOMAS A. WOOD,

Appellee.

PETITION FOR REHEARING.

ALEXD. FRED and
LOUIS M. BROWN,
8692 Wilshire Boulevard,
Beverly Hills, California,
Attorneys for Appellant.

Parker & Son, Inc., Law Printers, Los Angeles. Phone MA. 6-9171.

TABLE OF AUTHORITIES CITED

Cases

PAGE

American Chemical Paint Co. v. Dow Chemical Co., 164 F. 2d 208 4

Goff v. Will County National Building Corporation, 35 N. E. 2d 718 5

Hodgson v. Dorsey, 298 N. W. 895 5

Rules

Federal Rules of Civil Procedure, Rule 75(h) 3

Statute

Bankruptcy Act, Sec. 60 6

Textbook

7 Moore's Federal Practice (2d Ed.), Sec. 75.15(2), p. 3665, et seq. 4

No. 15,086

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

LEWIS H. SAPER, as Trustee in Bankruptcy of Riverside Iron & Steel Corporation,

Appellant,

vs.

THOMAS A. WOOD,

Appellee.

PETITION FOR REHEARING.

To the Honorable Walter L. Pope, James Alger Fee, and Stanley M. Barnes, Circuit Judges of the United States Court of Appeals for the Ninth Circuit:

Appellant respectfully petitions this Honorable Court for a rehearing of the appeal in the above matter on the ground that the decision rendered by it on May 7, 1957, was based on a misconception of the facts and issues decided by the District Court.

This court rested its affirmance of the trial court judgment on the ground that Riverside Iron & Steel Corporation and Harlan H. Bradt (hereinafter respectively referred to as "Riverside" and "Bradt"), of whose estates Appellant is the Trustee, had "assigned all their right, title and interest in the fund deposited in court" in the *Foley* action to Leroy B. Lorenz prior to bankruptcy.

This was not an issue submitted or decided by the trial court, but was a matter reserved for future determination in the event that Appellant prevailed on the limited issues actually submitted by the parties and decided by the trial court.

As the record on appeal makes clear, the entire case was heard on a written stipulation of fact and amendment to stipulation, which are quoted in full in the District Court's findings. [Tr. pp. 37-56.]

At the time that the stipulation of fact and amendment to stipulation were filed with the District Court, Appellant and Appellee also signed and filed a written "Statement of Issues." The Statement of Issues reads as follows:

> "THE COURT IS TO DETERMINE, BASED UPON THE FACTS AS STIPULATED TO:
>
> I.
>
> "Whether or not the money in the sum of $5800.07, paid over to Thomas A. Wood in satisfaction of the judgment obtained by the said Thomas A. Wood against Riverside Iron and Steel Corporation, a corporation, was received by the said Thomas A. Wood as the result of a lien arising out of writs of attachment or garnishment or writ of execution obtained by the said Thomas A. Wood within four months before the date of the filing of the voluntary petition in bankruptcy by Riverside Iron and Steel Corporation, i. e., within four months before March 14, 1951.
>
> II.
>
> "Did Thomas A. Wood obtain a lien upon the funds ultimately paid to him by order of the Superior Court of the State of California, in and for the County of Los Angeles, as the result of writs of

attachment or garnishment served prior to November 14, 1950, and if so, did such lien remain valid and subsisting on December 21, 1950?

"Dated this 13th day of April, 1954.

"Thomas A. Wood (sgd)
(Thomas A. Wood)
Attorney for Defendant
Louis M. Brown
Alex Denny Fred
By Alex D. Fred (sgd)
Attorneys for Plaintiff."

Through error or accident Appellant failed to designate the above quoted "Statement of Issues" as part of the record to be transmitted on appeal. Appellant believes he inadvertently omitted it from the record on appeal because Appellant was under the impression that the findings and opinion of the District Court were clearly directed and confined only to the issues embodied in the "Statement of Issues."

Appellant respectfully suggests that this Court exercise the power granted it by *Rule 75(h)* of the *Federal Rules of Civil Procedure** to include and consider the "Statement of Issues" as part of the record on appeal or, alternatively, to order it transmitted as a supplemental record. That this is a situation where the Court may properly

---

*Rule 75(h) provides in part: ". . . If anything material to either party is omitted from the record on appeal by error or accident or is misstated therein, the parties by stipulation, or the district court, either before or after the record is transmitted to the appellate court, *or the appellate court, on a proper suggestion or on its own initiative, may direct that the omission or misstatement shall be corrected,* and if necessary that a supplemental record shall be certified and transmitted by the clerk of the district court." (Emphasis added.)

act in the interests of justice cannot be doubted. 7 Moore's *Federal Practice* (2d Ed.), Sec. 75.15(2), p. 3665, *et seq.*, citing *American Chemical Paint Co. v. Dow Chemical Co.* (6 Cir.), 164 F. 2d 208.

Appellant submits that the inclusion of the "Statement of Issues" as part of the record on appeal, will make it self-evident that this Court rested its affirmance of the trial court judgment on an erroneous premise.

It is significant that the District Court made no finding that Riverside or Bradt had assigned the moneys involved to Leroy B. Lorenz. This Court impliedly recognizes the absence of such finding in stating in the next to last paragraph of its opinion that the District Court "findings state a ground for the decision which is independent of the grounds for affirmance which have been set forth above."

A careful examination of the record, it is submitted, shows that there is no evidence upon which to support such a finding, if, in fact, one had been made. The only reference to Leroy B. Lorenz is found in paragraphs XII and XIII of the Stipulation of Fact [Tr. pp. 42-44] where Appellant and Appellee stipulated that certain orders had been made by the Superior Court; the orders were quoted verbatim. In the orders reference was made to "LeRoy B. Lorenz, assignee of the judgment in favor of Riverside Iron and Steel Corporation and Harlan H. Bradt." But a reading of the orders makes it clear that the words "assignee of the judgment" were *descripto personae* only. They were not in any way or manner in-

tended to show the capacity or define the legal relationship between Lorenz and the bankrupts. See:

Goff v. Will County National Building Corporation (Ill.), 35 N. E. 2d 718, 720;

Hodgson v. Dorsey (Iowa), 298 N. W. 895, 897.

It is further submitted that the effect of the stipulation with reference to the above mentioned paragraphs, was to admit only that certain orders were made by the Superior Court of Los Angeles County, and not that Riverside had assigned its right and interest in the funds to Lorenz. In this connection it should be noted that the very order directing the Clerk to pay over the money involved to the Sheriff stated that it was to come from *"funds heretofore deposited . . . for the use and benefit of Riverside Iron and Steel Corporation, a corporation, and Harlan H. Bradt."* [Tr. pp. 44-45.]

The issue of the assignment admittedly was raised by the answer of the appellee. But it was a matter about which neither party felt foreclosed from presenting evidence at the proper time. The only issues before the District Court was whether or not Appellee had a lien on the funds, and whether such lien predated the four month period prior to the bankruptcy of his judgment debtor, Riverside. As Judge Carter pointed out in his memorandum of decision:

> "This case has been tried partially on the issue of whether Wood had a lien on the money. If the decision is in the affirmative, this disposes of the case. If not, then other issues as to insolvency of Riverside, etc. will have to be tried." [Tr. p. 24.]

Concededly, Appellant did not offer evidence with respect to the other elements required to show a preferential transfer under Section 60 of the *Bankruptcy Act*. But it is equally evident that these matters were reserved for future determination in the event Appellant prevailed on the question of whether Appellee obtained the money as a result of a lien acquired only within the four month period prior to the bankruptcy of Riverside. [Tr. pp. 48-49.] The District Court's decision against Appellant made the other issues of the case moot.

Sincere in the belief that the District Court erred as a matter of law on the issues actually before it, Appellant brought the instant appeal. In his opening and reply briefs on appeal, Appellant attempted to state the reasons and cite the decisions which he believes support his contention that the judgment should be reversed. The issues raised by Appellant's appeal were not passed upon by this Court because it rested its affirmance on other grounds. Appellant earnestly suggests that there consideration is necessary in order properly to determine the instant case.

Appellant urges that this Honorable Court grant the within petition for rehearing and reconsider its decision in the light of the foregoing discussion and on the basis of the issues raised in Appellant's briefs.

Respectfully submitted,

ALEX D. FRED, and

LOUIS M. BROWN,

By ALEX D. FRED,

Attorneys for Appellant.

Certificate of Counsel.

State of California, County of Los Angeles—ss.

Alex D. Fred, being first duly sworn, deposes, certifies and says: that he is one of the attorneys for Appellant's in this action; that he makes this certificate in compliance with Rule 23 of the Rules of this Court; that in his judgment the foregoing petition for rehearing is well founded; and that the same has not been interposed for delay.

Alex D. Fred.

Subscribed and sworn to before me this 5th day of June, 1957.

Margaret H. Fales,
Notary Public in and for the above County and State.
My Commission expires January 12, 1958.